

1 JOHN McBRIDE, ESQ., SBN 36458  
2 CHRISTOPHER E. PLATTEN, ESQ., SBN 111971  
3 MARK S. RENNER, ESQ., SBN 121008  
4 Wylie, McBride, Platten & Renner  
5 2125 Canoas Garden Avenue Suite 120  
6 San Jose, CA 95125  
Telephone: 408.979.2920  
Facsimile: 408.979.2934  
jmcbride@wmprlaw.com  
cplatten@wmprlaw.com

7 Attorneys for Plaintiffs and Cross-Defendants Robert Sapien,  
8 Mary Kathleen McCarthy, Than Ho, Randy Sekany,  
9 Ken Heredia, Teresa Harris, Jon Reger, Moses Serrano,  
10 John Mukhar, Dale Dapp, James Atkins, William Buffington  
11 and Kirk Pennington

12 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF SANTA CLARA**  
14

15 SAN JOSE POLICE OFFICERS' ASSOCIATION,  
16 Plaintiff,

17 v.  
18

19 CITY OF SAN JOSE AND BOARD OF  
20 ADMINISTRATION FOR THE POLICE AND FIRE  
21 DEPARTMENT RETIREMENT PLAN OF CITY OF  
22 SAN JOSE, and DOES 1-10 inclusive,  
Defendants.

23 AND RELATED CROSS-COMPLAINT  
24 AND CONSOLIDATED ACTIONS.  
25  
26  
27  
28

Case No. 1-12-CV-225926  
(and Consolidated Actions 1-12-CV-  
225928, 1-12-CV-226570, 1-12-CV-  
226574, and 1-12-CV-227864)

**TRIAL BRIEF OF PLAINTIFFS SAPIEN,  
HARRIS, AND MUKHAR, ET AL**

Trial Date: July 22, 2013  
Time: 9:00 a.m.  
Dept: 2  
Judge: Hon. Patricia M. Lucas

## INTRODUCTION

Under California law, when a public entity creates a pension system, the contract right to that pension immediately vests when an employee accepts employment. Modification of a pension system, for the limited purpose of keeping the system flexible and to maintain the integrity of the system is permitted. But before pension rights can be detrimentally affected, commensurate benefits must be given to prevent an unconstitutional impairment of pension entitlements. When governmental action impairs vested pension rights, the courts are required to enjoin such conduct.

Such is the case here.

The salient facts are not in dispute.

This case turns on three key documents: the *express* provisions of the two San Jose pension plans establishing the vested contract rights in the 1975 San Jose Federated Retirement Plan, in which the City's non-safety employees are compulsory participants, (San Jose Municipal Code (SJMC), Chapter 3.28, §§ 3.28.010 et seq.) and in the 1961 San Jose Police and Fire Retirement Plan, in which the City's safety employees (i.e., police officers and fire fighters) are compulsory participants (SJMC, Chapter 3.36, §§ 3.36.010 et seq.); and Measure B, a June, 2012 voter adopted charter amendment.

Measure B amends the City Charter to impose various changes and limitations to Plan benefits for active and retired employees. These changes and limitations impair the vested pension rights of plan participants, both active and retired.

These impairments include, but are not limited to, the provisions of Measure B that:

(a) alter the disability retirement benefits by redefining eligibility;

(b) empower the City Council to suspend and eliminate annual cost of living adjustments (COLAs) to retirees upon a declaration of a "fiscal and service level emergency";

(c) require employees to make additional contributions for up to 50% of the pension plan's unfunded actuarially accrued liability (UAAL);

(d) force employees to make additional uncapped contributions for up to 50% of the

1 retiree medical plan's unfunded UAAL; and,

2 (e) eliminate the Supplemental Retiree Benefit Reserve (SRBR), a "gain sharing  
3 plan" funding supplemental benefits to annuitants and survivors.

4 Because Measure B impairs the vested pension rights of complainants, the court  
5 must enjoin its implementation.

## 6 THE SALIENT FACTS OF THIS ACTION

### 7 The Federated Retirement Plan for Non-Safety Employees

8 Membership in the Plan is compulsory and a condition of employment for all non-  
9 safety employees. An actuarial valuation is prepared yearly to ensure actuarial soundness  
10 and the provision of benefits. Funding for retirement benefits comes from contributions  
11 from both the employees and the City and from investments. The Plan's Board of  
12 Administration determines contribution rates based on actuarial analysis. The contribution  
13 rates are set as a percentage of salary. The Plan is "level funded". Employee  
14 contributions are credited to individual employee member accounts for "normal service  
15 cost", i.e., the cost of benefits earned by employees in the current year. Employees make  
16 no contributions towards "prior service cost", i.e., the cost of employee benefits for prior  
17 years of service not otherwise covered by plan assets. When annual investment growth  
18 exceeds the actuarially assumed investment growth rate, the City's UAAL prior service cost  
19 is reduced. Moreover, when the funding ratio with the Plan's assets to liabilities exceeds  
20 100%, the positive UAAL (or over-funding of the Plan) serves as a credit in favor of the City  
21 by reducing its normal cost contributions.

22 Measure B amends the City Charter to alter plan provisions as it affects contribution  
23 rates and benefits for participants and annuitants. Measure B changes or eliminates  
24 existing retirement benefits enjoyed by current non-safety employees and retirees in  
25 pertinent part, as follows:

26 a. **Disability Retirement.** Under SJMC § 3.28.1200 et seq., active employees  
27 are entitled to a disability pension benefit if they can no longer perform their jobs. The  
28 Board determines entitlement for a disability retirement upon proof of "incapacity for the

1 performance of duty," whether service-connected or non-service-connected if the employee  
2 is "incapable of assuming the responsibilities and performing the duties of the position then  
3 held by him [sic] or of any other person in the same classification of positions to which the  
4 city may offer to transfer him". (SJMC § 3.28.1210.)

5 Among other things, Measure B, § 1509-A subdivisions (a) and (b) limits disability  
6 retirements for current and future employees to instances where the employee is unable to  
7 perform any other job *within the City, whether such job is available and whether or not the*  
8 *City offers such a job to the employee.* Thus, under Measure B, if a disabled Water  
9 Pollution Plant Mechanic is capable of performing secretarial duties, but no such positions  
10 are available, or not offered, the Plant Mechanic is ineligible for disability retirement  
11 benefits. Measure B, § 1509-A subdivision (c) displaces the responsibility for determining  
12 eligibility for disability retirement benefits from the Board, and instead vests that  
13 responsibility in "an independent panel of medical experts" subject to "a right of appeal to  
14 an administrative judge." Unlike the Board, the City paid "medical experts," an otherwise  
15 unidentified group, owe no fiduciary duty to plan participants.<sup>1</sup> Measure B does not define  
16 a "medical expert" nor does it define "an administrative judge".

17 Measure B does not afford any offsetting or comparable benefit or advantage to the  
18 Plan participants for § 1509-A.

19 b. **Cost-of-Living Adjustments.** Under SJMC §3.44.150, Plan annuitants and  
20 survivors receive an annual COLA of 3% to their monthly allowance, effective each  
21 February 1st. Measure B, § 1510-A authorizes the Council to suspend costs of living  
22 adjustment paid to current and future retirees for up to five years, if the Council adopts a  
23 resolution declaring a fiscal and service level emergency based on unidentified criteria.  
24 There is no requirement under Measure B to repay annuitants for the suspension or  
25 forfeiture of the COLAs.

26 \ \ \

27  
28 <sup>1</sup> Administrative boards of pension plans owe fiduciary duties to the employees and retirees. *Hittle v. Santa Barbara County Employees Retirement Board* (1985) 19 Cal.3d 374, 392-393.

1 Measure B does not afford any offsetting or comparable benefit or advantage to  
2 Plan participants for § 1510-A.

3 c. **Employee Contributions.** Under SJMC § 3.28.700 et seq., the Plan requires  
4 the City and employees to make contributions towards the normal cost of the Plan in a ratio  
5 of eight (City) to three (employee). The City is required to make 100% of the contributions  
6 toward the UAAL from insufficient Plan assets to pay projected retirement costs. Under  
7 Measure B, § 1506-A subdivision (b), beginning July 23, 2013, employees will be required  
8 to make additional contributions to pay the Plan's UAAL. San Jose employees will  
9 contribute from 4% of pay, up to a maximum of 16% of pay per year, but no more than half  
10 the yearly cost to pay the UAAL. There is no provision for a reduction in employee  
11 contributions in the event that the UAAL declines to less than current amounts. Moreover,  
12 under Measure B, § 1514-A, if a court determines that the provisions of § 1506-A  
13 subdivision (b) are unenforceable, equivalent monetary "savings" will be imposed on  
14 employees by "pay reductions".

15 Measure B does not afford any offsetting or comparable benefit or advantage to  
16 Plan participants for § 1506-A.

17 d. **Retiree Health Benefits.** Under SJMC §§ 3.28.380 et seq. and 3.28.200 et  
18 seq., the Plan establishes medical benefit accounts within the retirement fund to provide  
19 retiree medical benefits, including benefits for sickness, accident, hospitalization, dental or  
20 medical expenses. Contributions for the normal cost of these benefits are made by the City  
21 and the employees for dental benefits in the ratio of three (City) to one (employee) and for  
22 medical benefits in the ratio of one (City) to one (employee). SJMC § 3.28.380 et seq. sets  
23 out eligibility criteria for medical benefits annuitants and allocates the costs of premiums for  
24 medical benefits. Under Measure B, § 1512-A, the cost burden for unfunded liabilities for  
25 these benefits is increased for employees since they "must contribute a minimum of 50% of  
26 the cost of retiree healthcare, including both normal cost and unfunded liabilities"  
27 regardless of the amortization period and regardless of the cost per member. Moreover,  
28 Measure B, § 1512-A subdivision (b), prohibits vested retiree health benefits.

1 Measure B does not afford any offsetting or comparable benefit or advantage to  
2 Plan participants for § 1512-A.

3 e. **Supplemental Retirement Benefits.** Under SJMC § 3.28.340 a “gain  
4 sharing” segregated fund called the SRBR is established which requires the allocation of a  
5 portion of excess Plan investment income to fund supplemental benefits to annuitants.  
6 Measure B, § 1511-A discontinues the SRBR, and returns the SRBR segregated funds to  
7 the Plan's general fund and prohibits the payment of supplemental benefits out of the  
8 SRBR or other Plan assets.

9 Measure B does not afford any offsetting or comparable benefit or advantage to  
10 Plan participants for § 1511-A.

11 **The Police and Fire Retirement Plan for Fire Fighters**

12 Membership in the Plan is compulsory and a condition of employment for all San  
13 Jose Fire Fighters (SJFFs). As with the Federated Plan, an actuarial valuation is prepared  
14 yearly to ensure actuarial soundness and the provision of benefits. Funding for retirement  
15 benefits comes from contributions from both the employees and the City and from  
16 investments. The Plan's Board of Administration determines contribution rates based on  
17 actuarial analysis. The contribution rates are set as a percentage of salary. The Plan is  
18 “level funded”. Employee contributions are credited to individual member accounts for  
19 normal service cost. Employees make no contributions towards prior service cost, except  
20 for that portion of the contributions provided by SJMC §§3.36.1555 covering prior service  
21 for benefit enhancements to the Plan. This Plan provision requires member contributions  
22 because of the increased benefits provided by SJMC §§3.36.805 and §3.36.1020.B.3 For  
23 SJFFs, the contributions under §3.36.1555 cover the member cost for benefits  
24 improvements retroactively provided by an interest arbitration award under Charter §1111.  
25 These contributions represent the amount of normal service contributions SJFFs would  
26 have made from the effective date of the benefit increase (i.e., February 4, 1996) to the  
27 date of the interest arbitration award, amortized like prior service costs. In contrast, the  
28 City's contributions are credited to the Plan as a whole. When investments exceed the

1 actuarially assumed investment growth rate, the City's UAAL cost is reduced. Moreover,  
2 when the funding ratio with the Plan's assets to liabilities exceeds 100%, the positive UAAL  
3 (or over-funding of the Plan) serves as a credit in favor of the City by reducing its normal  
4 cost contributions.

5 Measure B amends the City Charter to alter plan provisions as it affects contribution  
6 rates and benefits for participants and annuitants. Measure B changes or eliminates  
7 existing retirement benefits enjoyed by current SJFFs and retirees and reduces retirement  
8 benefits in pertinent part, as follows:

9 a. **Disability Retirement.** Under SJMC §3.36.900 et seq., active fire fighters are  
10 entitled to a disability pension benefit if they can no longer work as fire fighters. The Board  
11 determines entitlement for a disability retirement upon proof of "incapacity for the  
12 performance of duty," whether service-connected or nonservice-connected if under SJMC  
13 §3.36.970 the fire fighter is "incapable of assuming the responsibilities and performing the  
14 duties of the position then held by him [sic] or of any other person in the same classification  
15 of positions [i.e., fire fighter classifications] to which the city may offer to transfer him".  
16 (SJMC §3.36.900.)

17 Among other things, Measure B, §1509-A subdivisions (a) and (b) limit disability  
18 retirements for current and future fire fighters to instances where the SJFF is unable to  
19 perform any other job within the San Jose Fire Department (SJFD), *whether such job is*  
20 *available and whether or not the City offers such a job to the fire fighter.* Thus, under  
21 Measure B, if a disabled fire fighter is capable of performing secretarial duties in the SJFD,  
22 but no such positions are available, or not offered, the fire fighter is ineligible for disability  
23 retirement benefits. Measure B, §1509-A subdivision (c) displaces the responsibility for  
24 determining eligibility for disability retirement benefits from the Board, which owes a  
25 fiduciary duty to the employees and retirees.<sup>2</sup> Instead Measure B vests that responsibility  
26 in "an independent panel of medical experts" subject to "a right of appeal to an  
27 administrative judge." Measure B does not define a "medical expert" nor does it define "an

28 <sup>2</sup> See footnote 1 above.

1 administrative judge". And Measure B, § 1509-A subdivision (e) reduces disability pension  
2 benefits by the amount of any worker's compensation award.

3 Measure B does not afford any offsetting or comparable benefit or advantage to the  
4 Plan participants for §1509-A.

5 b. **Cost-of-Living Adjustments.** Under SJMC §3.44.150 SJFF annuitants  
6 receive an annual COLA of 3% to their monthly allowance, effective each February 1st.  
7 Measure B, §1510-A authorizes the Council to suspend costs of living adjustment paid to  
8 current and future retirees for up to five years, if the Council adopts a resolution declaring a  
9 fiscal and service level emergency based on unidentified criteria. There is no requirement  
10 under Measure B to repay annuitants for the suspension or forfeiture of the COLAs.

11 Measure B does not afford any offsetting or comparable benefit or advantage to  
12 Plan participants for §1510-A.

13 c. **Employee Contributions.** Under SJMC §3.36.1500 et seq., the Plan  
14 requires the City and SJFFs to make contributions towards the normal cost of the Plan in a  
15 ratio of eight (City) to three (SJFF). SJMC §3.36.1520 provides that "[r]ates for current  
16 service shall not include any amount required to make up any deficit resulting from the fact  
17 that previous rates of contribution made by the city and members were inadequate to fund  
18 benefits attributable to service rendered by such members prior to the date of any change  
19 of rates . . . ." Aside from the specific exceptions resulting from collective bargaining, under  
20 SJMC §3.36.1550, the City is required to make 100% of the contributions toward the UAAL  
21 that results from insufficient Plan assets to pay projected retirement costs. Under Measure  
22 B, §1506-A subdivision (b), beginning July 23, 2013, employees will be required to make  
23 additional contributions to pay the Plan's UAAL. SJFFs will contribute from 4% of pay, up  
24 to a maximum of 16% of pay per year, but no more than half the yearly cost to pay the  
25 UAAL. There is no provision for a reduction in SJFF contributions in the event that the  
26 UAAL declines to less than current amounts. Moreover, under Measure B, §1514-A, if a  
27 court determines that the provisions of §1506-A subdivision (b) are unenforceable,  
28 equivalent monetary "savings" will be imposed on employees by "pay reductions".



1 Measure B does not afford any offsetting or comparable benefit or advantage to  
2 Plan participants for §1506-A.

3 d. **Retiree Health Benefits.** Under SJMC §3.36.575, the Plan establishes  
4 medical benefit accounts within the retirement fund to provide retiree medical benefits,  
5 including benefits for sickness, accident, hospitalization, dental or medical expenses.  
6 Contributions for the normal cost of these benefits are made by the City and the SJFFs for  
7 dental benefits in the ratio of three (City) to one (SJFF) and for medical benefits in the ratio  
8 of one (City) to one (SJFF). SJMC 3.36.1900 et seq. sets out eligibility criteria for medical  
9 benefits annuitants and allocates the costs of premiums for medical benefits. Under  
10 Measure B, §1512-A, the cost burden for unfunded liabilities for these benefits is increased  
11 for SJFFs since they “must contribute a minimum of 50% of the cost of retiree healthcare,  
12 including both normal cost and unfunded liabilities” regardless of caps on contributions  
13 provided by labor agreements, the amortization period and the cost per member.  
14 Moreover, Measure B, § 1512-A, subdivision (b), prohibits vested retiree health benefits.

15 Measure B does not afford any offsetting or comparable benefit or advantage to  
16 Plan participants for §1512-A.

17 e. **Supplemental Retirement Benefits.** Under SJMC §3.36.580 a “gain  
18 sharing” segregated fund called the SRBR is established which requires the allocation of a  
19 portion of excess Plan investment income to fund supplemental benefits to annuitants. The  
20 plan permits the City Council to establish the method of benefits distributions, but does not  
21 permit the Council to change that methodology once established. Measure B, §1511-A  
22 discontinues the SRBR, and returns the SRBR segregated funds to the Plan’s general fund  
23 and prohibits the payment of supplemental benefits out of the SRBR or other Plan assets.

24 Measure B does not afford any offsetting or comparable benefit or advantage to  
25 Plan participants for §1511-A.

26 \\\

27 \\\

28 \\\

1                                   **Measure B Impairs Complainants' Vested Pension Rights**

2           **I.     The Vested Rights Doctrine Prohibits Measure B's Unilateral**  
3                   **Reductions in Benefits Under Both Retirement Plans.**

4           The right to compensation already earned, specifically pensions, is a vested right  
5 protected under prohibitions against impairing contractual obligations in both the United  
6 States and the California Constitutions. (*Allen v. Board of Administration* (1984) 34 Cal.3d  
7 114, 120; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 782; *Betts v. Board of Administration*  
8 (1978) 21 Cal.3d 859; *Miller v. State of California* (1977) 18 Cal.3d 808,814.) This vested  
9 contractual right to pension benefits accrues upon acceptance of employment. (*Allen v.*  
10 *Board of Administration, supra.*) A public employee's entitlement to a pension "is among  
11 those rights clearly 'favored' by the law." (*Hittle v. Santa Barbara Employees Retirement*  
12 *Assn.* (1985) 39 Cal.3d 374, 390.) Indeed, the courts recognize that public employee  
13 pension benefits serve a public purpose since these benefits serve "as an inducement to  
14 enter and continue in public employment" and "provide agreed subsistence to retired public  
15 servants who have fulfilled their employment contracts." (*Quintana v. Board of*  
16 *Administration* (1976) 54 Cal.App.3d 1018, 1021.) While "an employee does not earn the  
17 right to a full pension until he (sic) has completed the prescribed period of service,...he has  
18 actually earned some pension rights as soon as he has performed substantial services for  
19 his employer." (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.)<sup>3</sup> "By entering  
20 public service an employee obtains a vested contractual right to earn a pension on terms  
21 substantially equivalent to those then offered by the employer," (*ibid.*), and to earn  
22 additional pension benefits under improved terms implemented during continued  
23 employment. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 530 ("We conclude that incumbent  
24 legislators had a vested right to earn additional pension benefits through continued  
25 service...."); *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d  
26 695, 703 ("[T]he employee has a vested right not merely to preservation of benefits

27  
28 <sup>3</sup> (See also, *Carman v. Alvord* (1982) 31 Cal.3d 318, 325; and *Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 242; Cal. Const. art I, §§ 9, 17, 19.)

1 already earned pro rata, but also, by continuing to work until retirement eligibility, to earn  
2 the benefits, or their substantial equivalent, promised during his prior service"); *Wallace v.*  
3 *City of Fresno* (1954) 42 Cal.2d 180, 183.)<sup>4</sup> A former employee does not, of course, have  
4 a vested right to benefits granted after the employee leaves employment, (*id.*), however,  
5 employees have a reasonable expectation that existing benefits will not be diminished for  
6 future employment service. (*United Firefighters v. City of Los Angeles* (1989) 210  
7 Cal.App.3d 1095, 1107-1108.) A charter amendment cannot destroy vested pension  
8 rights. (*Kern, supra*, 29 Cal.2d at pp. 855-856.) In short, employees have vested rights not  
9 merely to preserve the pension benefits already earned, but to continue to earn benefits  
10 under the same terms previously promised.

11 The decision of the Second District Court of Appeal in *County of Orange v. Assn. of*  
12 *Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 41-48 summarized these basic  
13 principles comprising the vested rights doctrine when it affirmed the dismissal of an action  
14 brought by the Orange County Board of Supervisors. The court's opinion indicates the  
15 power and reach of the vested rights doctrine. The county claimed that the enhanced  
16 retirement formula for prior years of service adopted in 2001 violated the California  
17 Constitutional prohibition on extra compensation. (Cal. Const., art. XI, § 10.) In addition,  
18 the county asserted that its action in 2001 violated the municipal debt limit in Article XVI,  
19 Section 18(a), of the California Constitution because applying the enhanced retirement  
20 benefit formula to prior years of service immediately created an UAAL, which was "an  
21 enforceable debt" greater than the county's revenues in 2001. The court rejected these  
22 arguments noting that the county's assault on the vested rights doctrine was 70 years too  
23 late. (*County of Orange, supra*, 192 Cal.App.4th at 42, n.4 and pp. 43-45, citing, *Sweesy v.*  
24 *L.A. etc. Retirement Bd.* (1941) 17 Cal.2d 356.) Further, the court found that calculations  
25 of UAAL were premised on estimates, assumptions, and projections, (*County of Orange v.*  
26 *Assn. of Orange County Deputy Sheriffs, supra*, 192 Cal.App.4th at pp. 34-37, relying on 65  
27 Ops.Cal.Atty.Gen. 571-572) — not the stuff of enforceable obligations.

28 <sup>4</sup> (See also, *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 345.)

1 So the county lost on all counts. Perhaps the county's best argument was one  
2 outside the purview of a court:

3  
4 The County emphasizes its current difficult financial situation  
5 and the "ruinous fiscal irresponsibility" of the prior board of  
6 supervisors. Imprudence, however, is not unconstitutional. (Id.,  
7 192 Cal.App.4<sup>th</sup> at p. 39.)

8 Here, the pension rights are set forth in the SJMC. Therefore terms of the contract  
9 at issue are express. (*Retired Employees Association of Orange County, Inc. v. County of*  
10 *Orange [REAOC]* (2011) 52 Cal.4<sup>th</sup> 1171, 1178; see also, Civ. Code § 1620.) By the  
11 express provisions, both plans are cognized as "qualified governmental defined benefit  
12 plans," pursuant to the Internal Revenue Code. (SJMC §§ 3.28.010 subdivision D and  
13 3.36.010 subdivision D.) There can be no question that the benefits provided under both  
14 plans are intended to be vested. (See, *REAOC* at pp. 1189-1190, and cases cited therein.)  
15 Unlike the facts in the *REAOC* case, there is no explicit provision in the SJMC, or the  
16 charter that declares the pension benefits created by the SJMC to be other than vested.  
17 (See, 2012 U.S. Dist. LEXIS 146637 (C.D. Cal., August 13, 2012, at pp. 28-29.) Moreover,  
18 where, as here, the plans are actuarially reviewed for sound financial footing, a conclusion  
19 should be drawn that the plans create a vested contractual status. (*Valdes v. Cory* (1983)  
20 139 Cal.App.3d 773.)<sup>5</sup>

21  
22  
23 <sup>5</sup> Recently, the California Public Employees' Retirement System (CalPERS) issued a position paper  
24 setting forth in summary form the fundamentals of the vested rights doctrine protecting the pension promises  
25 made to public employees. (<http://www.calpers.ca.gov/eip-docs/about/press/new/vested-rights.pdf>.) The  
26 general rules are:

27 Rule 1: Employees are entitled to benefits in place during their employment.  
28 Rule 2: Employees are only entitled to amounts reasonably expected from the contract.  
Rule 3: Only lawful contracts with mutual consideration are protected by California's contracts clause.  
Rule 4: Future employees have no vested rights to the current statutory scheme.  
Rule 5: Retired and inactive members have vested rights to the benefits promised to them when they  
worked.

Rule 6: The vested rights of active employees may be unilaterally modified only under extremely  
limited circumstances. The modifications must be "reasonable," meaning that alterations of employees'

1 For purposes of discussing how to control future pension costs, it bears repeating  
2 that future employees have no vested right to any particular retirement benefits or to  
3 continuation of current retirement plans prior to their employment. (See, *Legislature v. Eu*,  
4 *supra*; *California Association of Prof. Scientists v. Schwarzenegger* (2006) 137 Cal.App.4<sup>th</sup>  
5 371, 383.) But the vested rights doctrine includes the scope of an employee's contribution  
6 obligation as provided for *by the pension plan*. (*Allen v. City of Long Beach, supra*, 45  
7 Cal.2d at p. 130.)

8 Vested rights may not be bargained away by labor organizations. (See, *San*  
9 *Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4<sup>th</sup> 1215, 1225;  
10 *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506.) Memorandums of  
11 Understanding may not abrogate fundamental constitutional rights, such as retirement  
12 benefits. (*San Bernardino Public Employees, supra*, 67 Cal.App.4<sup>th</sup> at p.1225.) But vested  
13 contractual pension rights may be modified prior to retirement for the purpose of keeping a  
14 pension system sufficiently flexible to permit adjustments in accord with changing  
15 conditions and at the same time maintain the integrity of the system. (*IAFF v. City of San*  
16 *Diego* (1983) 343 Cal.3d 292, 300-301. See also, *Claypool v. Wilson* (1992) 4 Cal.App.4<sup>th</sup>  
17 646, 664.) "[Such] modifications must be reasonable," and must satisfy a two-part test: (1)  
18 any resulting disadvantage to a member must be accompanied by a comparable, offsetting  
19 advantage; and (2) the modification of the pension rights "must bear some material relation  
20 to the theory of a pension system and its successful operation . . . ." (*Olson v. Cory* (1980)  
21 27 Cal.3d 532.)

22 Measure B does not provide any compensating advantages offsetting its significant  
23 disadvantages. On this ground alone, the Measure B constitutes an unlawful impairment of  
24 contract. The opinion in *Newman v. City of Oakland Retirement Board* (1978) 80  
25

---

26 pension rights must bear some "material relation to the theory of a pension system and its successful  
27 operation." Further, changes that result in a disadvantage to employees must receive comparable  
28 advantageous new changes.

Rule 7: The Government's "Emergency" powers are extremely limited and cannot be used to reduce  
the benefits that have been promised.

1 Cal.App.3d 450 is instructive. There, the case involved change in a disability retirement  
2 system and its adverse effect on an officer who had been retired for disability. The court  
3 noted that pension provisions must be liberally construed in favor of a pension and that the  
4 "the nature and extent of (the City's) statutory obligation must be ascertained not only from  
5 the language of the pension provision but also from the judicial construction of this or  
6 similar legislation at the time of contractual relationship is established." (80 Cal.App.3d at p.  
7 458 (citation omitted).) In *Newman*, the court held that the disabled officer was entitled to  
8 the disability benefit in effect at the time of his employment, not as adopted after the  
9 occurrence of his disability. (80 Cal.App.3d. at p. 463.)

10 Here, the structure and terms of the San Jose plans, as well as the history of their  
11 creation and modification, evidence binding contractual commitments vesting upon  
12 commencement of employment.

13 As the trial will show:

14 • All employees are required to become members of the appropriate plan upon  
15 commencement of employment. (SJMC §§ 3.28.440 and 3.36.400.)

16 • The plans are actuarially valued for long term sustainability – anticipating  
17 fiscal soundness and assurance of the stated benefits upon retirement. (SJMC §§ 3.28.160  
18 and 3.36.150 et seq.)

19 • Each employee is required is to make contributions determined by the Board  
20 of Administration based on the actuarial calculations. (SJMC §§ 3.28.700, et seq and  
21 3.36.1520.)

22 • Except as otherwise provided, the City is solely responsible for any short fall  
23 in the accumulated pension funds resulting from investment experience or change in  
24 benefits. ( SJMC §§ 3.28.850, 3.28.880, 3.28.770, 3.36.1550 and 3.36.1525.)

25 • The City uses the basic benefits of the pension plans in its employee  
26 recruitment.

27 • On numerous occasions attorneys and management officials of the City have  
28 stated that pension rights are vested and that changes cannot occur unless any

1 disadvantage is balanced by a comparable advantage.

2 Based on these facts, it is clear that the plans' provisions regarding disability  
3 retirement, both the processes for determining eligibility and the level of benefits afforded  
4 under the SJMC provide vested rights.

5 Measure B does not satisfy the test for legality under the vested rights doctrine as  
6 refined by decades of California case law. First, Measure B does not offer any comparable  
7 advantage to offset the reductions in benefits imposed. Second, because Measure B  
8 alters contributions and benefits, it affects the actuarial soundness of the plans — Measure  
9 B bears no material relation to the theory of a pension system based *on long term*  
10 *actuarially sound funding of benefits and the successful operation of the plans*. Measure B  
11 is the antithesis of long term funding of benefits since, among other things, it alters long  
12 established benefits and permits the Council to eliminate COLAs. While Measure B  
13 provides lowered pension costs to the City, this does not equate to the theory of a  
14 pension system and its successful operation based on long term funding. The vested  
15 rights doctrine bars implementation of Measure B to complainants.

16 **II. There Are No Defenses to Measure B's Impairment of Benefits Under**  
17 **Either Retirement Plan.**

18 The City asserts several defenses to the impairment of contract claim, none of which  
19 permit the impairment of retirement benefits wrought by Measure B.

20 First, the City claims that the provisions of San Jose City Charter Sections 1501 and  
21 1503 permit alteration of benefits and contributions under the plans. Not so.

22 Neither charter provision addresses the vesting of pension rights. As the court has  
23 already recognized in its order denying the City's motion for summary adjudication, the  
24 charter language does not preclude the creation of vested contract rights in the express  
25 plan provisions. "A public employee's pension constitutes an element of compensation,  
26 and a vested contractual right to pension benefits accrues upon acceptance of  
27 employment, . . . ." (*IAFF v. City of San Diego, supra*, 34 Cal.3d at p. 300.) Moreover, the  
28 pension rights at issue arise from express, written plan provisions, and not the charter. If

1 the City had meant to limit vested pension rights in the plans, as it purports to do in § 1508-  
2 A subdivision (h) of Measure B, then it would have so stated in the plans, ab initio. The  
3 plans contain no language abrogating the vested pension rights doctrine. In short, prior to  
4 Measure B, the charter does not alter or limit the vested nature of the pension rights  
5 provided under either retirement plan.

6 Second, the City's justification for Measure B, the alleged financial burden caused  
7 by pension plan costs is irrelevant to the issue of whether Measure B impairs vested  
8 pension rights. Saving money is not a sufficient justification for changing vested pension  
9 rights. "The change must be otherwise lawful and must provide comparable advantage to  
10 the employees whose contract rights are modified." (*Claypool v. Wilson*, supra, 4  
11 Cal.App.4th at p. 666.)

12 Third, the City contends that it possesses blanket authority to amend the plans.  
13 This is an assertion of overriding police power as a charter entity. The case authority does  
14 not support the City's contention. For example, in *Lucchesi v. City of San Jose* (1980) 104  
15 Cal.App.3d 323, the Charter set up a civil service system with appointments based on  
16 merit, fitness and other evidence of competence. The City enacted an ordinance which  
17 gave a competitive advantage to existing City employees in applying for employment as  
18 fire fighters. The court found that that ordinance conflicted with and could not amend the  
19 Charter. (104 Cal.App.3d at pp. 331-333.) The preference given was arbitrary and  
20 discriminatory against non-City employees violating both the state and federal  
21 constitutions. (*Ibid.*) There is no contention here that the pension plans violate either the  
22 charter or the state and federal constitutions.

23 In *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4<sup>th</sup> 161, the City enacted  
24 an ordinance requiring bidders on public works contracts to comply with the City's  
25 subcontractor Outreach Program to women and minority subcontractors to insure that  
26 minority subcontractors and all others have equal opportunity to participate in the  
27 subcontracts. There was a requirement that bid documents include documentation of good  
28 faith efforts to comply with this Outreach Program. The City Charter required awarding



1 public works contracts to the "lowest and best regular responsible bidder." Petitioner's bid  
2 was rejected for failure to timely provide documentation of the required good faith effort of  
3 the program.

4 Petitioner filed a writ action. The trial court denied it. The Court of Appeals  
5 reversed the trial court on the basis that the Outreach Program was not specifically set  
6 forth in the Charter. The Supreme Court reversed. It held that the Outreach Program and  
7 requiring documentation of steps taken to comply with the Outreach Program were not  
8 inconsistent with the lowest and best bid provision in the Charter and since under public  
9 contract law, an awarding agency can reject any bid that does not comply fully with the  
10 requirements, the rejection was appropriate. (9 Cal.4<sup>th</sup> at pp. 174-176.) The Court  
11 explained that charters "operate not as a grant of power, but as an instrument of limitation  
12 and restriction on the exercise of power over all municipal affairs which the city is assumed  
13 to possess; and the enumeration of powers does not constitute an exclusion or limitation."  
14 (Id., at p. 170 (citations omitted).) Again, there is nothing in San Jose's charter granting  
15 powers to vitiate vested pension rights created under the plans.

16 Justice Baxter's opinion in *Domar* quotes the decision in *City of Grass Valley v.*  
17 *Walkinshaw* (1949) 34 Cal.2d 595. In *Grass Valley* the City Charter has a limitation set on  
18 the amount of property tax the City could impose (.75 cents per \$100 of value). The charter  
19 provided for the issuance of bonds (for indebtedness exceeding \$5,000) and incorporated  
20 state law for the procedure for creation and issuance of the bonds. State law authorized  
21 cities to incur bonded indebtedness and to levy and collect taxes to pay for it. The Supreme  
22 Court held that the authority to issue bonds gave the City the power to levy a special tax  
23 and create the duty to exercise its taxing power. (Id.) In sum, since the charter's limit did  
24 not specifically limit all taxes to .75 cents per \$100 there was no conflict. The court  
25 explained:

26 \ \ \

27 \ \ \

28 \ \ \

1 "A construction in favor of the exercise of the power and against  
2 the existence of any limitation or restriction thereon which is not  
3 expressly stated in the charter is clearly indicated. So guided,  
4 reason dictates that the full exercise of the power is permitted  
5 except as clearly and explicitly curtailed. Thus in construing the  
6 city's charter a restriction on the exercise of municipal power  
7 may not be implied." (34 Cal.2d at p. 599.)

8 Here, under the Charter, the City could have created pension plans which restricted  
9 or denied any vested rights. When both plans were enacted, the settled case law was  
10 explicit: once established a pension creates vested rights.<sup>6</sup> The City could have avoided  
11 this constraint by providing an ordinance establishing pension plan language eliminating or  
12 limiting the vesting of rights. The City did not do so then, but now seeks to do so through  
13 Measure B. Too late. Unlike the plan provisions at issue in *International Firefighters Local*  
14 *145 v. City of San Diego* (1983) 34 Cal.3d 292 or in *Pasadena Police Officers Ass'n. v. City*  
15 *of Pasadena* (1983) 147 Cal.App.3d 695, 711, there is nothing in either plan authorizing the  
16 changes wrought by Measure B. Rather, Measure B makes unilateral material changes to  
17 the plans, for which no advantages compensate for the obvious contractual impairments.

18 Nor may the City find succor in the decision in *Walsh v. Board of Administration*  
19 (1992) 4 Cal.App.4<sup>th</sup> 682. *Walsh* involved amendments to the Legislative Retirement  
20 System, at the time the legislature was converting to full time operations and  
21 reapportionment was occurring. A special statute protected pension rights of legislators  
22 who were reapportioned out of office. In 1974, before the plaintiff left office, the special  
23 statute was repealed by the legislature while the plaintiff was still in office. Later denied a  
24 pension benefit under the repealed statute, he sued claiming an impairment of contract. At

25 <sup>6</sup> When legislation is enacted the public body does so with knowledge of existing laws, both judicial and  
26 statutory:

27 Both the legislature and the electorate by the initiative process are deemed  
28 to be aware of laws in effect at the time they enact new laws and are  
conclusively presumed to have enacted the new laws having direct bearing  
upon them. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 [257  
Cal.Rptr. 320, 770 P.2d 732]; *People v. Weidert* (1985) 39 Cal.3d 836, 844  
[218 Cal.Rptr. 57, 705 P.2d 380]; *People v. Sikverbrand* (1990) 220  
Cal.App.3d 1621, 1628 [270 Cal.Rptr. 261].)

(*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.)

1 the time, the California Constitution, art. IV, Section 4, paragraph 3 provided: "The  
2 legislature may prior to their retirement, limit benefits payable to members who serve  
3 during or after the term commencing in 1967." (*Walsh, supra*, 4 Cal.App.4th at p. 701.)  
4 The appellate court held that Walsh, who left office at the end of the 1974 legislative  
5 session, could not recover retirement benefits under the special statute for two reasons.  
6 First since there was not an ongoing appropriation for the benefit under the special statute  
7 and therefore there was no contract, and second because, in any event, there could be no  
8 vesting of a contractual right since the legislature had the authority to limit and pension  
9 rights. Here, the San Jose charter does not include any language enabling the City to limit  
10 retirement benefits after acceptance of employment under existing plans which do not  
11 contain any limitation or restriction on vesting of contractual rights. Rather, the City Charter  
12 authorizes the Council to create the very plans giving life to the vested benefits at issue.

13 Federal case law does not apply here. California law is more protective of public  
14 employee pension rights than federal law. (*Legislature v. Eu, supra*, 54 Cal.3d 492, citing,  
15 *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 781.) Therefore, the City's federally based  
16 cross-claims fail.

17 Finally, the City may argue at trial that some city labor organizations waived the  
18 vested right not to pay for prior service by agreeing in recent collective bargaining  
19 agreements to increased pension contributions from employees. But this argument fails to  
20 grasp that the increased employee contributions were to individual employee accounts,  
21 and not for prior service. These additional contributions agreed to by most of the employee  
22 labor organizations did not constitute an amendment to the plans. While the contributions  
23 increased assets of the plans, and as a result decreased the UAAL, the effect is incidental.  
24 The employee contributions did not alter the actuarial allocation of normal cost and prior  
25 service cost; nor did it restructure or relieve the City of its burden to pay 100% of the UAAL.  
26 Indeed, the employee contributions did not pay the UAAL obligation directly.

27 \\\

28 \\\

1 **CONCLUSION**

2 Measure B violates the vested pension rights of complainants. It does not provide  
3 reasonable modifications to existing benefits, under either retirement plan. Rather, it  
4 materially alters, reduces and eliminates existing benefits, under both retirement plans, in  
5 ways that do not bear upon the successful operation of the plans. Measure B is a cost-  
6 shifting and benefit reduction act, breaking promises made over decades to San Jose  
7 employees and annuitants. Moreover, Measure B offers no comparable advantages to  
8 participants in either retirement plan and therefore, it is an unconstitutional impairment of  
9 contract.

10 Based on the law, the court is duty bound to enjoin the enforcement of Measure B  
11 as against the constitutionally protected rights of complainants.

12  
13 Dated: July 8, 2013

14 WYLIE, McBRIDE,  
15 PLATTEN & RENNER

16 

17 JOHN McBRIDE

18 CHRISTOPHER E. PLATTEN

19 Attorneys for Plaintiffs and Cross-Defendants

20 Robert Sapien, Mary Kathleen McCarthy, Than Ho,  
21 Randy Sekany, Ken Heredia, Teresa Harris, Jon Reger,  
22 Moses Serrano, John Mukhar, Dale Dapp, James Atkins,  
23 William Buffington and Kirk Pennington

24  
25  
26  
27  
28  
I:\0230\72256\pnd\trial\plaintiffs trial brief.docx